In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1147

H. NEIL KELLY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals did not render an opinion.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1969. A petition for rehearing was denied on December 5, 1969. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to February 3, 1970, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

377-447—70

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdicts of guilty.

2. Whether it was error for the trial court to refuse to give an instruction in the specific language requested by the defense as to petitioner's failure to testify in his own defense.

STATEMENT

After a jury trial, petitioner was convicted in the United States District Court for the District of Columbia on three counts of an indictment which charged false pretenses (Count 1) and the uttering of bad checks (Counts 2 and 3), in violation of 22 D.C. Code 1301, 1410. On April 5, 1968, he was sentenced to from one to three years' imprisonment on the false pretense count, and to one year on each of the other two counts. The sentences were made to run concurrently. The court of appeals affirmed without opinion.

The evidence showed that petitioner, a resident of the Miami, Florida, area, knew two residents of the District of Columbia, Harding and Connor. In August–September 1965, Harding had a dormant account with a stock brokerage firm of which Connor was a registered representative (App. 40, 87–88).[1] Petitioner, after conferring with Connor, obtained Harding's permission to use the latter's account for a stock purchase which petitioner desired to make (App. 41–

[1] "App." refers to petitioner's appendix on file with the Clerk of this Court and contains excerpts from the relevant proceedings below.

43, 59–60, 63, 67, 80, 89, 115). On September 2, 1965, the stock purchase was made (App. 89–91), ostensibly in behalf of Harding at a cost of approximately $2,800 (App. 45–47, 89–91, 97). At about this time, Harding's bank balance was approximately $14 (App. 32). On September 9, petitioner gave Connor a check drawn on petitioner's Miami bank account, made out to Harding in the amount of $3,000 (App. 92–93, 104). When this check was turned over to Harding, he endorsed it and deposited it in his account. On the same day in mid-September, Harding issued his own check to his brokerage firm in the amount of $2,835.30, to pay for the stock purchase (App. 33, 44–47, 85, 97, 142). At the time Harding did this, petitioner's checking account in his North Miami bank reflected only one deposit, the $100 deposit used to open his account (App. 21–22).

When petitioner gave Connor the $3,000 check which named Harding as payee (Counts 1 and 2), he also gave Connor a check which named Connor as payee, for $2,205,[2] drawn on the same North Miami $100 checking account (Count 3). When petitioner gave Connor the two checks, petitioner told Connor he was financially solvent[3] (App. 93–96). Both the

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[2] The purpose of this check is unknown. It evidently was not, as petitioner states (Pet. 10), in payment of a past due obligation, since that was the subject of a third check which petitioner gave to Connor at the same time he gave him the other two checks (App. 94).

[3] When Harding complained regarding petitioner's check, Connor told Harding that he knew that petitioner's check to Harding would "bounce" (App. 75, 138). It appears that Harding complained after petitioner's check to Connor had been

Harding and Connor checks were dishonored because of insufficient funds (App. 98–99).

In October, petitioner was advised by Connor of this fact, but petitioner did not make the checks good (App. 101). In December, petitioner called Harding and asked him to send him the shares of stock which the brokerage firm had purchased for Harding's account. Petitioner said that if Harding would do so, he would make good the $3,000 check which he had written. Harding attempted to do so, but the shares were later returned to him, because petitioner was not at the Columbus, Ohio address which he had given to Harding (App. 47).

ARGUMENT

1. Petitioner claims that the evidence of guilt was insufficient because there was no evidence that petitioner had not been extended credit by his Florida bank "to cover the checks which he allegedly wrote" (Pet. 13). This checking account, however, never contained more than $100, and the dishonor by the bank of his two multi-thousand dollar checks indicated clearly that the bank had not extended credit to petitioner. The government is not required to negate every possibility of innocent mistake by petitioner. Having

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returned for insufficient funds (App. 106). There was a delay in Harding's acquisition of knowledge concerning the worthlessness of the $3,000 check given to him. Harding's bank, through error, initially honored Harding's check to the stock broker and the stock broker thereafter delivered the shares purchased to Harding (App. 34–35, 47). The bank did not charge Harding with an overdraft until October 13, 1965 (App. 163).

shown that the checks were dishonored and that petitioner failed to make good on them, the government made out a submissible case. See *Wilson* v. *United States,* 162 U.S. 613, 619–620; *Holland* v. *United States,* 348 U.S. 121, 138; *Roviaro* v. *United States,* 353 U.S. 53, 63; *Rhay* v. *Browder,* 342 F. 2d 345, 349 (C.A. 9).[4]

2. Petitioner's trial counsel requested an instruction as to petitioner's silence at trial. Part of this request was that the jury be told that "the defendant has not been completely silent in this case" since he had pleaded not guilty and thereby "put in issue every factual element" which had to be proved (see Pet. 10). The court declined to instruct as requested (App. 173, 182). It did instruct that no defendant was required to testify and that no presumption of guilt nor inferences of any kind were to be drawn from the failure to testify (App. 197). The court also explained to the jury that the burden was on the government to prove the defendant guilty beyond a reasonable doubt as to every element of each offense charged

[4] Petitioner raises as an issue and briefly mentions in argument (Pet. 2, 14) an alleged variance between the pleadings and the proof with regard to the $3,000 check which was the subject of counts 1 and 2. There does not, however, appear to be any variance with regard to this check. There is an obvious typographical error with regard to the $2205 check referred to in count 3. The indictment states that the transaction relating to this check occurred "on or about Sept. 9, 1966" when, in fact it occurred in Sept. 1965. The check itself, however, showing the correct date, is incorporated in the indictment, and as the trial court ruled, no prejudice resulted from this clerical error (App. 151–152).

(App. 192). The instruction given was proper. See *Glavin* v. *United States*, 396 F. 2d 725, 730 (C.A. 9), certorari denied, 393 U.S. 926. A trial court need only give a correct instruction. There is no requirement that an instruction be given in the language requested by defense counsel. *United States* v. *Kelly*, 349 F. 2d 720, 760–761 (C.A. 2), certiorari denied, 384 U.S. 947.

Petitioner raises as a question that the court's instructions were erroneous in other respects (Pet. 2). The instructions appear to be wholly proper. Thus, the jury was told that: "If the check [the subject of Count 1] is not covered by sufficient funds, then you may find a false representation has been made." (App. 202). Later, the court said "You may find that the person to whom the false representation was made [Harding] relied upon it if the evidence shows beyond a reasonable doubt that he would not have turned over something of value but for the false representation made by the defendant * * *. The phrase, 'something of value' includes a check drawn in the sum of $2835.30 and delivered" (App. 202–203). Clearly, the use of the word "may" in the instructions connoted permissive rather than mandatory conclusions by the jurors. If Harding relied upon petitioner's representations and then issued his own check for $2835.30 to his stock broker, he delivered something of value. As a result, Harding's check resulted in a loss to Harding or his bank of the amount of the check (App. 163–164). Clearly, "something of value" may cause financial loss to another as

well as financial gain to one's self. See *Beck* v. *United States,* 305 F. 2d 595, 599 (C.A. 10), certiorari denied, 371 U.S. 890; cf. *United States* v. *Lepowitch,* 318 U.S. 702, 704.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970